case apparently *contra* to this general holding, where an inn-keeper was indicted for obstructing the passage of the mails by detaining the coach horses. He pleaded his innkeeper's lien, and it was held insufficient.[7] In this case, however, the indictment was under a statute which forbade absolutely any obstruction to the passage of the mails. The decision, therefore, seems not to modify the weight of authority. On principle, moreover, there seems no valid objection to the enforcement of the lien. It is one thing to say the courts may not take property out of the possession of the government; it is another and quite different thing to say that when the government submits to the processes of the courts in order to regain its property, the ordinary legal obligations with regard to that property must not be satisfied. In this latter case it is reasonable to say that the government by its appearance as a suitor waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.[8]

SIMILAR OCCURRENCES AS EVIDENCE. — It is often important to determine the quality of a certain object or act, such as the value of land, the dangerous character of a drug, or the reasonableness of an act. To prove this, it is customary to bring forward other occurrences under more or less similar circumstances which throw light upon this quality. Speaking generally, such evidence is admissible unless in the opinion of the judge its probative value is outweighed by a resulting multiplicity of issue or undue surprise.[1] As a result of the vagueness of this rule, the decisions are chaotic and arbitrary. It would seem, however, that in certain cases distinctions might be drawn which would tend to simplify the question.

In considering whether evidence should be excluded on the ground of surprise, a distinction may be noted between the effects and operations, under similar circumstances, of the same object or act, and of a similar object or act. For example, to prove that a certain grading where the plaintiff had fallen was dangerous, evidence of other falls from the same grading, or from a similar grading in another city, might be offered. In the first case there should be no exclusion on the ground of surprise, since the nature of one particular thing only is brought in question, and both parties must have known that its own effects would probably be produced as evidence.[2] When, however, the operations or effects of other similar acts or objects are offered, the judge should be free to exclude them unless for some reason their introduction ought to have been anticipated.[3]

Unless the similar occurrences offered in evidence are numerous, they should not be excluded on the ground of multiplicity, for they can cause no great danger either of confusing the issue or unduly protracting the trial. And whenever the number of instances becomes so great that the judge might exclude them for that reason, that very fact would seem to make an opinion necessary and admissible through which these same instances might

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[7] U. S. *v.* Barney, 3 Hall's Am. L. Jour. 128 (U. S. D. C.).
[8] See The Siren, 7 Wall. (U. S.) 152, 159.

[1] Greenl. Ev., 16th ed., § 14 v.
[2] Hunt *v.* Lowell Gas Co., 8 Allen (Mass.) 169; Darling *v.* Westmoreland, 52 N. H. 401; District of Columbia *v.* Armes, 107 U. S. 519.
[3] Paine *v.* Boston, 4 Allen (Mass.) 168; Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. 454.

be admitted indirectly. As a general rule opinion evidence is excluded only when superfluous.[4] If separate occurrences cannot be adequately presented to the jury, or if they are such that jurymen would not have the technical knowledge necessary to draw a correct inference, a witness better qualified to deal with the question may state his conclusion.[5] And as a general rule he is allowed to state the facts on which this conclusion is based.[6] This same reasoning applies also to individual conduct, where numerous occurrences under similar conditions constitute a custom.[7] In a late Wisconsin case, to prove the plaintiff's due care, evidence of the existence of a general railroad custom for switchmen in the yards to ride on the side of freight cars was admitted. *Boyce* v. *Wilbur Lumber Co.*, 97 N. W. Rep. 563. Clearly this could be admitted only as an opinion, for whether a custom exists is nothing but a conclusion of the witness from numerous individual instances within his knowledge, which he might have been allowed to state to show the reasons for that conclusion. Accordingly, whenever individual instances, otherwise admissible, are sought to be excluded on the ground that multiplicity prevents an adequate presentation to the jury, that very ground makes admissible an opinion which possesses all the probative value of separate occurrences and may be used to indirectly introduce the occurrences themselves.

COUNTERCLAIM AND THE JURISDICTIONAL LIMITS OF COURTS. — By a statute almost universal in the United States, the right is conferred on the defendant in any action at law to counterclaim any right he may have against the plaintiff and recover the amount that his claim exceeds the latter's. The broad language of these statutes raises an interesting question when the defendant's counterclaim is greater in amount than the jurisdictional limit of the court in which the plaintiff has brought his action. The courts in such cases have reached different results. A recent New York case holds that the court can take jurisdiction of the counterclaim and give judgment on the merits, though the amount far exceeds the jurisdictional limit of the court. *Howard Iron Works* v. *Buffalo, etc., Co.*, 176 N. Y. 1. Another view, held in South Carolina, is that by filing the counterclaim the defendant ousts the court of jurisdiction of the whole matter.[1] The majority of the courts, however, hold that in such cases the defendant cannot file his counterclaim, but must sue it out in the proper court as a separate action.[2]

A counterclaim is a separate cause of action, which the defendant is authorized to litigate in the same action with the plaintiff's claim.[3] To allow the defendant to recover on his counterclaim a greater amount than the court is allowed to try in a direct action is to strike at the foundations of jurisdictional limitations on lower courts. By such a rule it becomes

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[4] Greenl. Ev., 16th ed., § 441 b.

[5] *Cf.* Cornell *v.* Green, 10 S. & R. (Pa.) 14, 16; Commonwealth *v.* Sturtevant, 117 Mass. 122; Hardy *v.* Merrill, 56 N. H. 227, 241.

[6] Dickenson *v.* Inhabitants of Fitchburg, 13 Gray (Mass.) 546, 555; Kostelecky *v.* Scherhart, 99 Ia. 120.

[7] Cass *v.* Boston & Lowell R. R. Co., 14 Allen (Mass.) 448; Grand Trunk R. R. Co. *v.* Richardson, *supra.*

[1] See Haygood *v.* Boney, 43 S. C. 63.

[2] Griswold *v.* Pieratt, 110 Cal. 259; Almeida *v.* Sigerson, 20 Mo. 497.

[3] Standley *v.* Northwestern, etc., Co., 95 Ind. 254.